

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

FILMED

APR 11 1991

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) FINAL ORDER
NO. 67795-s76D BY PETER ZARNOWSKI)

* * * * *

The Proposal for Decision in this matter was entered on January 22, 1990. Objectors Robert Mummey and Thomas and Penny Brookes filed timely exceptions to the Proposal. An Oral Argument Hearing was held on Wednesday, March 6, 1991, in Kalispell, Montana. Present at the Oral Argument were Donald R. Murray, Attorney for the Applicant; Cheryl Zarnowski; Objector Robert Mummey; Objector Thomas Brookes; Faye Bergan, Attorney with the Department of Natural Resources and Conservation (Department); and Charles F. Brasen, Regional Manager of the Department's Kalispell Water Resources Regional Office.

The Proposal for Decision proposed to grant a conditional Beneficial Water Use Permit to Peter Zarnowski to appropriate 12 gallons per minute (gpm) up to .07 acre-feet of water per annum from an unnamed tributary of Grave Creek, to be diverted by an electric pump from a sump located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, for year round stock use in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, both in Township 35 North, Range 25 West, Lincoln County, Montana.

Objectors take exception to Finding of Fact 6, Conclusions of Law 4, 5, 7, 8, and 9 of the Proposed Order, and to the Hearing Examiner's failure to make certain findings.

For this review, the Department must accept the Proposal's

CASE # 67795

Findings of Fact if they were based upon competent substantial evidence and the proceedings on which the Findings were based complied with essential requirements of law. Mont. Code Ann. § 2-4-621(3) (1989) and ARM 36.12.229.

Objectors contend Finding of Fact 6 incorrectly states the interference to Objector Mummey's water rights when the water level in the upper pond is reduced. Objector Mummey testified that when the water level in the upper pond drops six and one-half inches, he is not able to obtain water for domestic use. They also argue that any water use from the upper pond by the Applicant results in competition with Objector Mummey's other water rights.

The record contains references to both the two feet level as stated by the Hearing Examiner and the six and one-half inches level indicated by Objector Mummey as the water level of the upper reservoir when Objector Mummey can no longer divert water for domestic use. However, the point is moot because the Hearing Examiner proposed a condition to limit Applicant's appropriations to periods when the upper reservoir is spilling. By limiting Applicant's appropriation to periods when the upper reservoir is spilling, the Hearing Examiner assured no appropriation of Objector Mummey's stored water in that impoundment by the Applicant.

Objectors take exception to Conclusion of Law 4 stating that the multi-year dispute between the parties over water undermines the Examiner's conclusion that there is unappropriated water in

the source.

The Hearing Examiner took the evidence on the record and concluded there are, at least in some years, unappropriated waters. Applicant has used the water for 13 years with only one call from a senior user. The mere fact that there is a multi-year dispute does not carry enough weight to controvert the evidence in the record.

Objectors except to Conclusion of Law 5 challenging Applicant's legal right to enter Objector Mummey's property, averring that the question of whether an appropriator's diversion and delivery works are legally upon the property of another is a relevant and substantial factor in determining the adequacy of appropriation works.

Whether the Applicant presently holds an easement necessary for carriage of the water he seeks to appropriate is not an issue which requires resolution in order to make a determination of whether Applicant has met the criteria for issuance of a Permit.

Section 85-2-311, MCA, does not explicitly mandate that an Applicant prove possession of a right to conduct appropriated water over the property of another. The conditional nature of a Permit makes such an interpretation impossible. In re Application No. 55390-s76H by Grayson.

In Grayson it was held that possession of a right to conduct water is an incident necessary to the completion of an appropriation and without it no water right will vest. However, to hold that § 85-2-311, MCA, requires the prospective

appropriator to prove possession of such incidents of completion prior to the issuance of the Permit which licenses initiation of the appropriation, would certainly place the cart before the horse. Such a requirement would force the hopeful appropriator to invest time, money, and energy developing details of an easement which he may never need (should the Permit be denied on other grounds). Such a construction of the statute would, in contravention of the policy and purpose of the Montana Water Use Act, discourage the wise use of water in this State by turning the permitting process into high-stakes gambling which few could afford to risk.

Objectors take exception with Conclusion of Law 7 arguing Objector Brookes need only have an interest that would be adversely affected by the proposed appropriation, claiming Brookes has an interest in this dispute because Applicant's appropriation works runs across Objector Brookes' property.

Conclusion of Law 7 does not dismiss Objector Brookes' objection, it merely states that Objector Brookes does not have a water right which can be adversely affected by the proposed appropriation. Applicant's diversion works do cross Objector Brookes' property, however, that is an easement question which is discussed above.

Objectors in their exception to Conclusions of Law 8 complain that due to the shortage of water in the source, Objector Mummey would need to monitor Applicant's water use on an almost daily basis to prevent interference with Mummey's senior

water rights and to issue repeated calls thus minimizing the advantages of being a senior water right holder.

The record indicates that in the 13 years Applicant has exercised his domestic water use right, the source was called on only one occasion, thus inferring Objector Mummey has been able to obtain sufficient water without doing so. The record does not support a finding that additional amount, 65 gallons per day, Applicant seeks to appropriate, will dramatically increase the burden on the stream to the point where Objector Mummey will need to call the source repeatedly.

Objectors except to Conclusion of Law 9 arguing that unless water is spilling from the lower pond, all water in the upper and lower ponds is in the constructive possession of Objector Mummey. Further, they argue that all water in both ponds below the overflow pipes is necessary to maintain all Objector Mummey's water rights. The Objectors also take exception with Hearing Examiner's failure to make a finding of fact on the interference to Objector Mummey's water rights in the lower pond that results when Applicant uses water from the upper pond.

There are four Abstracts of Water Right in the record with Robert Mummey identified as the owner, W141373-76D, W141374-76D, W141375-76D, and W141376-76D. Three of these water right claims, W141373-76D, W141375-76D, and W141376-76D, are for uses from the upper reservoir, which is located in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, Township 35 North, Range 25 West, Lincoln County, Montana. The fourth water right claim, W141374-76D, is for stock water use

with the point of diversion in the SE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of said Section 5; however, this abstract does not indicate a reservoir is involved and the means of diversion is identified as "flowing".

There is no evidence that any senior water rights in the lower reservoir would be adversely affected by the proposed use which is subject to any existing water rights. See Proposal for Decision at page 11, n. 4.

Objectors also take exception to the Examiner's failure to make a finding concerning Applicant's proposed wasteful use of water; that the proposed use is nominally beneficial. Objectors argue that while Applicant may use the water for domestic and stock water purposes, the availability of his own well indicates that water use pursuant to this application would be surplus to his needs and such a proposal is for unreasonable, inefficient, and wasteful use of water.

A review of the statutes and of case law provides no foundation for the argument that an applicant should not be allowed to appropriate from one source because he has an alternate source. If an appropriator can make beneficial use of his intended appropriation without adversely affecting senior appropriators, and can meet the relevant statutory criteria, he is not bound to use water from an alternate source. The Department is authorized to consider the amount of water available to the Applicant as a factor in a determination on the beneficial use criteria; however, the existence of other water rights does not mean the Applicant in the present matter cannot

beneficially use both the well and the water sought in the instant Application. In fact, Applicant's testimony indicates the groundwater well does not provide enough water to allow household use and lawn or garden irrigation simultaneously, much less the added burden of the proposed stock water use. Moreover, the Applicant cannot be required to use his well instead of water sought in the instant Application, even if he could obtain sufficient water from his well to meet his needs, as Objectors have suggested. An appropriator cannot be compelled to forego his use of a water right for the benefit of other appropriators on the source simply because he has another source available to him. See generally Boyd v. Huffine, 144 Mont. 306, 120 P. 228 (1911); In re Application No. 43117-s41P by Mancoronal; In re Application No. 54911-g42M by Sackman; In re Application No. G65713-76N by Fagan.

Objectors except to the Proposed Order arguing that Applicant has not satisfied the statutory criteria by substantial credible evidence, specifically the criterion that the amount of water is available at times when the water can be put to the use proposed, therefore, the Application should be denied.

Applicant has met his burden to satisfy the criteria, see discussion above.

Objectors suggest that if the Application is granted, the conditions proposed by the Hearing Examiner should be retained and five other conditions should also be imposed.

The first condition proposed by the Objectors would require

Applicant to provide the Department with sufficient evidence that he has legal basis to cross Objectors' properties.

The easement question has been thoroughly discussed herein and evidence of an easement will not be required of the Applicant by the Department.

The second condition proposed by the Objectors would require the Applicant to attempt to satisfy his water needs with water from his groundwater well before diverting water pursuant to this Application.

The alternate source subject has also been discussed. The Department cannot require such a condition.

Objectors suggested a third condition, that the Applicant should be "required to install, at his expense, those pressure relief valves [sic] and measuring devices, including a meter indicating peak flow and cumulative volume that can be measured on Objector Mummey's property . . ." Further, the Objectors believe the Applicant should be required to maintain a weekly log of the amount of water diverted from sources on Objector Mummey's property.

To require a measuring device to monitor a diversion of 12 gpm up to 65 gallons per day is unreasonable. However, to require the Applicant to keep a written record of the flow rate and volume of all water diverted including the period of time, and to submit said records by November 30 of each year to the Water Resources Regional Office in Kalispell is not unreasonable.

Objectors would further condition the Permit with a fourth

condition that Applicant's diversion should commence only when water is spilling from the lower pond and should cease whenever water is not spilling from the lower pond.

Such a condition is unnecessary and unwarranted. See discussion at page 6.

Objectors propose a fifth condition that would rescind or modify Applicant's Permit if his water use impairs the ability of Objector Mummey to use his water rights.

All permits are subject to prior rights. Even though it is not explicitly stated on every permit, any permittee who violates the conditions of his permit may have his permit modified or revoked. See § 85-2-314, MCA.

THEREFORE, having given the matter full consideration and based upon the Findings of Fact and Conclusions of Law and upon any modifications specified herein, and upon all files and records in this matter, the Department makes the following:

ORDER

That subject to the terms, conditions, restrictions, and limitations set forth below, Beneficial Water Use Permit No. 67795-s76D be granted to Peter Zarnowski to appropriate 12 gpm up to .07 acre-feet per annum from an unnamed tributary of Grave Creek, withdrawn by means of an electric pump from a sump located in the NE¼NW¼SW¼ of Section 5, Township 35 North, Range 25 West, Lincoln County, Montana, for year round stock use in the SE¼NE¼SE¼ of Section 6, in above-said Township and Range.

The Permit in this matter is issued subject to the following

express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required by the Permittee's Permit uses.

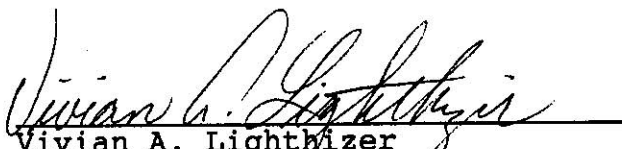
D. Permittee shall not divert hereunder unless water is spilling from Mummey's upper pond, i.e., unless Mummey's upper pond is filled to the level marked by the present elevation of the top of the vertical overflow pipe therein, with some overflow.

E. The Permittee shall keep a written record of the flow rate and volume of all waters diverted, including the period of time, and shall submit said records by November 30 of each year to the Water Resources Regional Office, 3220 Highway 93 South, P.O. Box 860, Kalispell, MT 59903-0860.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of the Final Order.

Dated this 25th day of March, 1991.


Vivian A. Lighthizer
Hearing Examiner
Department of Natural Resources
and Conservation
Water Resources Division
1520 East 6th Avenue
Helena, Montana 59620-2301

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this 28th day of March, 1991, as follows:

Pete and Cheryl Zarnowski
P.O. Box 242
Fortune, MT 59918

Thomas and Penny Brookes
P.O. Box 858
Eureka, MT 59917

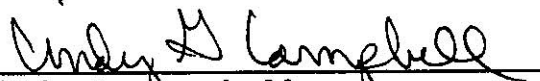
Robert Mummey
P.O. Box 551
Eureka, MT 59917

Donald R. Murray
Murphy, Robinson, Heckathorn,
and Phillips, P.C.
P.O. Box 759
Kalispell, MT 59903

Ted Doney
Doney, Crowley and Shontz
P.O. Box 1185
Helena, MT 59624-1185

Chuck Brasen, Manager
Kalispell Water Resources
Regional Office
P.O. Box 860
Kalispell, MT 59901

Faye Bergan
Legal Unit
Department of Natural
Resources & Conservation
1520 East 6th Avenue
Helena, MT 59620-2301


Cindy G. Campbell
Hearings Unit Secretary

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

BB
FILMED

FEB 13 1990

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 67795-s76D BY PETER ZARNOWSKI)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held in the above-entitled matter on April 14, 1989, in Kalispell, Montana.

Applicant Peter Zarnowski appeared by and through Donald R. Murray, attorney at law. Mr. Murray called witness Pete Zarnowski, adverse witnesses Thomas Brooks and Robert Mummey, and introduced 13 exhibits. Applicant's Exhibits A (a copy of a permit), B (a copy of a permit), C (a copy of a permit), D (a copy of an easement), E (a certificate of water right), F, G, H (late Statements of Claim), I (a copy of a letter), J (a copy of a letter), L and M (copies of Field Investigation forms), and Q (a large hand drawn map) were admitted.

Objector Robert Mummey and Objectors Thomas and Penny Brooks appeared by and through John Thorson, attorney at law. Mr. Thorson called witness Robert Mummey and introduced 21 exhibits. Objectors' Exhibits 1, 2, 3, 4 (water right abstracts), 5, 6, 7 (topographic maps), 8 (aerial photo), 9 (a hand drawn map), 10 through 20 (photos), and 21 (a copy of a letter) were admitted.

CASE # *67795*

Charles Brasen, Field Manager of the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC"), Water Rights Bureau Kalispell Field Office appeared as Department staff witness. There was no objection to any of the contents of the Department file.

The record was left open at the end of the hearing for receipt of briefs from the attorneys. The record closed on May 15, 1989. The record was subsequently reopened to allow telephonic re-recording of the testimony of Chuck Brasen, a portion of which testimony was inadvertently not recorded at the hearing. The record was again closed on November 3, 1989.

FINDINGS OF FACT

1. The captioned Application, duly filed on March 15, 1988 at 1:35 p.m., requests 12 gpm up to .07 acre-feet per annum from an unnamed tributary of Grave Creek, diverted by electric pump from a sump located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, Township 35 North, Range 25 West, Lincoln County, Montana, for year-round stock use in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, in above-said Township and Range.

2. The pertinent facts of the Application were published in the Tobacco Valley News, a newspaper of general circulation in the area of the source, on April 14, 1988. Timely Objections to the Applications were received from Robert Mummey and Thomas and Penny Brooks. Both Objectors assert that there are insufficient unappropriated waters in the source of supply; that the proposed Permit would interfere with the rights of the Objector; that the

proposed means of diversion is inadequate; that the proposed means of conveyance is inadequate; that Applicant does not have the consent of Objector to enter upon his land; that entry upon Objector's property would interfere with his use and enjoyment thereof.

3. Objector Brooks presently claims no water rights in the unnamed tributary of Grave Creek or Grave Creek.

4. In 1983, Objector Mummey purchased property from Objector Brooks together with four claimed water rights (Nos. W141373 through W141376) to divert from the unnamed tributary of Grave Creek 0.3 cfs up to 30 acre-feet per year of water for irrigation of 12 acres and for fish and wildlife use; 30 gpm up to 5.00 acre-feet per annum of domestic water; and 30 acre-feet per annum of stock water. Each claimed water right carries a priority date of July 2, 1917.

The Mummey rights are diverted as follows. The unnamed tributary is twice dammed thereby creating two reservoirs - an upper reservoir (surface area = .87 acre), from which Mummey withdraws domestic water by means of pump placed in a cistern which is connected to the pond by means of a buried gravel "pipe". Excess water overflows the upper pond by means of a vertical overflow pipe, enters the stream channel below the dam, and thence flows into a lower reservoir (surface area = .93 acre) from which stock drink. Excess water escapes the lower pond by means of a vertical overflow pipe. The lower pond also loses some water to seepage which surfaces below the dam. Fish are

stocked in both reservoirs; irrigation water is apparently withdrawn from the upper reservoir.

5. Applicants and their predecessors have utilized the proposed appropriation works to divert 15 gpm up to 3.59 acre-feet per annum of water from the unnamed tributary since at least 1969 under color of entitlement, i.e., a Certificate of Water Right, priority date March 15, 1984 and/or a right predating the passage of the Water Use Act (recently late claimed). Applicant has diverted water from the upper reservoir, which is located on the property of Objector Mummey, by means of a 3/4 h.p. pump placed in a 9 foot deep cistern which is connected to the pond by means of a buried gravel "pipe". Water has been conveyed from the pump to the place of use by means of a plastic pipe.

6. There is no evidence of record regarding the flow or annual volume of water produced by the unnamed tributary, except that such flow is often insufficient to keep Objector Mummey's small reservoirs constantly full. The reservoirs have never been empty; however, Mummey cannot obtain domestic water from his cistern if the level of water in the upper pond drops two feet or more below the level of the overflow pipe.

7. Objector Mummey demanded that Zarnowski cease diverting water during 1988 when the level of the upper pond fell so low that there was insufficient water in Mummey's cistern to supply him with domestic water. Although he stated he had not had enough water to supply all his claimed water rights to their full extent since 1984, and that the reservoir levels were low in

1984, 1985, 1986, and 1987, Mummey did not before 1988 demand that Zarnowski cease diverting, and Zarnowski did divert during those years. Mr. Mummey did not say why he did not prior to 1988 demand that Zarnowski cease diverting. Mr. Brooks, who owned the Mummey rights prior to 1984 at no time demanded that Zarnowski cease diverting between 1976 and 1984, and stated at the hearing that Zarnowski never interfered with his water rights.

8. Department records show no reservations of water from the unnamed tributary, and no other Permits thereon.

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled; therefore, the matter is properly before the Hearing Examiner.

2. The Department has jurisdiction over the subject matter herein, and all the parties hereto.

3. The Department must issue a Beneficial Water Use Permit if the Applicant proves by substantial credible evidence that the criteria set forth in § 85-2-311(1), MCA, are met.

4. In order to meet the criterion set forth in § 85-2-311(1)(a), MCA, Applicants must prove by substantial credible evidence that, at least in some years, sufficient unreserved water will be physically available at the point of diversion to supply their needs throughout the period of diversion, and that, at least in some years, no legitimate calls for that water will be made by a downstream senior appropriator. In re Hadley, No.

60662-76G, Proposal at p. 9 (May 31, 1988). In other words, Applicants must prove not only that in at least some years sufficient water will be physically present at the point of diversion throughout the period Applicant seeks to appropriate, but also that such water will then be legally available for his use. The evidence here shows that there is always sufficient water physically available in the source at the point of diversion to supply the amount Applicant seeks (Finding of Fact 6); however, Applicant must also prove that such water is not required by senior appropriators, in this case Objector Mummey, the only other appropriator on the source.

There is no recorded evidence quantifying the amount of water produced by the unnamed tributary annually, nor is there sufficient evidence of how much water is actually beneficially used by Objector Mummey to estimate actual demand. (Claims establish maximum demand, but that is not necessarily reflective of actual demand during an average year.) Rather, in order to show that there is water in the source which is not needed by Objector Mummey, Applicant relies on the fact that in 13 years of diverting he has only been called for water once, in the drought year of 1988. Such evidence tends to show that there is sufficient water in the source to supply all existing uses¹, thus lending

¹ The logical inference to be drawn from the fact that an appropriator has not called for water is that he has been able to obtain sufficient water without doing so. In the instant case, although it is possible that Mummey did not call for some other reason, Mummey offered no other explanation.

credence to the assertion that there is unappropriated water in the source.

Here, although the actual production of the source is not of record, the fact that it is very often not sufficient to keep two small fish ponds continuously overflowing shows that it is not very large. Thus, the Examiner recognizes that, although the lack of calls by Mummey and Brooks tends to show in most years there is sufficient water in the source to supply both Mummey's and Zarnowski's uses as they have been exercised in the past, there most probably is not much extra. However, the amount of water requested, 65 gallons per day (.07 acre-foot per year if diverted every day) is minuscule in comparison to the current uses. The fact that existing uses evidently have been adequately supplied, with serious competition in only one year in 13, coupled with the fact that it is highly unlikely that the source has in the other 12 years produced only just enough water to supply these existing uses and no more, establishes a high probability that .07 acre-foot (less than 0.2% of the existing claimed maximum demand) of unappropriated water exists in the source in at least some years. Therefore, the Examiner concludes that the criterion stated in § 85-2-311(1)(a) has been met.

5. Clearly, the means of diversion, operation, and construction of the appropriation works are adequate to physically capture and deliver water to Applicant, as they have been successfully used to do just that for at least 13 years. Although there is some question as to Applicant's legal entitlement to

enter upon or use Mummey's property to obtain water, this does not indicate inadequacy of the appropriation works. See In re Grayson, No. 55390-s76H, Proposal for Decision, January 24, 1986.

Another consideration is that Applicant apparently relies on the appropriation works of another, i.e., Mummey, to create sufficient water depth in the source to enable Applicant to the described appropriation works.² Applicant may have no legal interest in Mummey's impoundment; if not, Applicant will not be able to compel its continued existence. Should the impoundment cease to exist, the present appropriation works would be inadequate. However, § 85-2-311, MCA, does not require that Applicant prove indefinite future viability of the appropriation works. A showing that they are now physically adequate is sufficient to fulfill the criterion.

6. Stock use is a beneficial use of water. Section 85-2-102(2), MCA.

7. Objector Brooks has no water rights on or below this source; therefore, he has no water right which can be adversely affected.

8. Objector Mummey's allegation that there is insufficient unappropriated water in the source to supply both the existing uses and the proposed use is not in itself an allegation of

² It should be noted that Applicant is not using Mummey's appropriation works to divert water. Applicant's means of diversion consist of the gravel "pipe" and pump. However, it is true that Applicant's means of diversion would not operate absent Mummey's impoundment.

adverse effect. When there is insufficient unappropriated water in the source, the effect of a new Permit on that source would simply be that Mummey would have to "call" the source. Having to exercise seniority is not an adverse effect to a water right.

(Senior appropriators having to make excessive calls is prevented by the requirement that Applicant prove there is sufficient unappropriated water in the source in at least some years.)

9. Any diversion of water which has already been rightfully reduced to possession by a prior appropriator will adversely affect the water right of that prior appropriator, and no permit may issue which cannot be administered to prevent same.

When water is plentiful, water at the proposed point of diversion will consist of: (a) unappropriated water; (b) water constructively possessed by Mummey, i.e., water for which he could exercise his seniority as against a junior user (such water as is bound for use in the lower pond); and (c) water which is actually possessed by Mummey, i.e., such water as has been impounded in the upper pond and which is required for fish and wildlife, irrigation, and domestic use.³ When there is no unappropriated water (a), the doctrine of "first in time, first in right" entitles Mummey to prevent a junior user from diverting water in the source constructively possessed by Mummey (b); however, before the junior has a duty to cease diverting, Mummey

³ If diversion was not out of the onstream impoundment, the water at the point of diversion would consist of (a) and (b), but not (c).

must "call" the source, i.e., inform the junior that he is exercising his seniority. On the other hand, Mummey has no duty to call for water once it has been reduced to his actual possession (c), as under no circumstances does the junior have the right to divert it. Indeed, such water as has been reduced to actual possession is Mummey's personal property until he is finished using it, and diversion thereof by anyone else would constitute conversion. See In re Zemliska, No. 57870-s76M (September 25, 1987). Regardless, any diversion of stored water by the Applicant would result in losses of stored water greater than were historically lost to the system. Such increased loss is an adverse effect to Mummey's senior right.

To ascertain whether Applicant would be diverting Mummey's stored water, it must be determined how much of the content of the upper pond is storage, and how much is not. From the evidence, it appears that, if the level of the upper reservoir drops two feet below the level of the top of the vertical overflow pipe, Mummey cannot obtain domestic water. Thus, although it is unclear whether Mummey's fish and wildlife, and irrigation rights entitle him to a certain pond depth, it is clear that the design of the domestic system does require a certain minimum depth. There is no evidence that the means of domestic diversion are unreasonable; therefore, it may be concluded that all water stored in the pond up to the minimum depth necessary to operate the domestic right is the personal property of Mummey. As has been stated, any diversion of such water by Applicant would adversely

affect Mummey. Therefore, no permit may issue which authorizes diversion of such water.

In addition to the minimum depth required for the domestic use, certain other waters in the upper pond will have been reduced to storage (possession) for later use for irrigation, and fish and wildlife. While the depth required for the nonconsumptive fish and wildlife use may be conterminous with the domestic depth, it is certain that the consumptive irrigation use requires storage in addition to the domestic uses. Water impounded for this consumptive use would necessarily require depth in addition to the domestic use. Accordingly, at a given time Mummey's storage may include some or all of the water in the pond above the minimum depth for the domestic use.

Applicant did not provide evidence as to how much water in the pond is or is not storage at any given time, and the record does not otherwise contain sufficient evidence regarding same. It is only certain that the water in the upper pond is not Mummey's rightful storage when the upper pond is spilling. Therefore, in order to preclude adverse effect to Mummey's water rights, the Permit must be conditioned to limit Applicant's diversion to periods when the upper pond is spilling.⁴

10. The proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been

⁴ Of course, Mummey continues to have the right to call the source for water to supply the water rights attendant to the lower pond insofar as he is legally entitled to do so.

issued or for which water has been reserved. (Finding of Fact 8.)

WHEREFORE, the Examiner proposes the following:

ORDER

That subject to the terms, conditions, restrictions, and limitations set forth below, Beneficial Water Use Permit No. 67795-s76D be granted to Peter Zarnowski to appropriate 12 gpm up to .07 acre-feet per annum from an unnamed tributary of Grave Creek, diverted by electric pump from a sump located in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 5, Township 35 North, Range 25 West, Lincoln County, Montana, for year round stock use in the SE $\frac{1}{4}$ NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 6, in above-said Township and Range.

The Permit in this matter is issued subject to the following express terms, conditions, restrictions, and limitations:

A. This Permit is subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana law. Nothing herein shall be construed to authorize appropriations by the Permittee to the detriment of any senior appropriator.

B. Issuance of this Permit by the Department shall not reduce the Permittee's liability for damages caused by exercise of this Permit, nor does the Department, in issuing this Permit, acknowledge any liability for damages caused by exercise of this Permit, even if such damage is a necessary and unavoidable consequence of the same.

C. The Permittee shall allow the waters to remain in the source of supply at all times when the water is not reasonably required by the Permittee's Permit uses.

D. Permittee shall not divert hereunder unless water is spilling from Mummey's upper pond, i.e., unless Mummey's upper pond is filled to the level marked by the present elevation of the top of the vertical overflow pipe therein, with some overflow.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party within 20 days after service of the exception. However, no new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 22 day of January, 1990.



Robert H. Scott, Examiner
Department of Natural Resources
and Conservation
1520 East 6th Avenue
Helena, Montana 59620-2301
(406) 444-6625

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record at their address or addresses this 23rd day of January, 1990, as follows:

Pete Zarnowski
P.O. Box 242
Fortune, Montana 59918


Thomas and Penny Brooks
P.O. Box 858
Eureka, Montana 59917

Robert Mummey
P.O. Box 551
Eureka, Montana 59917

Chuck Brasen, Field Manager
3220 Highway 93 South
P.O. Box 860
Kalispell, Montana 59901

Donald R. Murray
Murphy, Robinson, Heckathorn,
and Phillips, P.C.
P.O. Box 759
Kalispell, Montana 59903

John E. Thorson
Doney & Thorson
P.O. Box 1185
Helena, Montana 59624


Irene V. LaBare
Legal Secretary